In the United States Circuit Court of Appeals for the Ninth Circuit

LEMUEL S. FOWLER AND THOMAS SINGER, *Plaintiffs in Error,* vs. THE UNITED STATES OF AMERICA, *Defendant in Error.*	No. 3597

Upon writ of error to the United States District Court of the Western District of Washington, Northern Division.

BRIEF OF DEFENDANT IN ERROR.

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STATEMENT OF THE CASE.

Plaintiffs in Error, Fowler and Singer and other codefendants not now before this court, were indicted on three counts under Penal Code Section 37, for the crime of conspiring. Count 1, to violate Section 1, of the Act of February 13, 1919, prohibiting the breaking of seals of railroad cars containing interstate shipments, the entering of said cars and stealing

therefrom articles in interstate commerce and the possession of such stolen goods; Count II, to violate Section 35 of the U. S. Penal Code, as amended by act of Congress October 28, 1918, by actually stealing and possessing such interstate shipments. Count III, to defraud the United States by taking. stealing, carrying away, purloining, embezzling and converting to their own use such interstate shipments of merchandise from the railroads while they were within the control and under the operation of the United States.

To the indictment thus filed, defendant William Ratcliff, not here appealing, pleaded guilty and was duly sentenced. Defendant Edward Bourdell changed his plea from not guilty to, guilty, during the progress of the trial, went to his room in a hotel in the town of Auburn, and committed suicide. (Brief of Plaintiffs in Error P. 57).

Defendant Creed Lane was convicted and is now serving a term in the Federal penitentiary.

Herbert William Hanson was convicted and is also serving a term in the Federal penitentiary.

Defendant Thomas Singer was also convicted and is here appealing, together with defendant Lemuel S. Fowler, so that this appeal concerns only the defendants Singer and Fowler, the other defendants not

having appealed at all, or having abandoned the appeal as shown by the record.

While the indictment is for conspiracy in three counts it could readily have been for the same crime in one count combined and stating the various offenses that the defendants had conspired to commit, but it is of no consequence to the appealing defendants that three counts, instead of one, are alleged in the indictment.

The assignments of error as incorporated in the record and urged in the brief, to the effect,

1. That the Court erred in permitting testimony under the indictment not conformable to that of defendant Ratcliff who had entered a plea of guilty to the entire indictment.

2. That the court erred in not striking such testimony.

3. That the court erred in over-ruling the demurrer interposed to each count of the indictment.

4. That the court erred in refusing to compel the government to elect at the conclusion of its case upon what conspiracy it would rely for a conviction.

5. That the court erred in denying a motion for a directed verdict for each of the defendants.

6. That the court erred in receiving the evidence of the defendant and witness Sarah Lewis. (Tr. P. 69-70).

ARGUMENT.

Discussing the errors in the order in which they are presented in the behalf of plaintiffs in error, we find that their alleged errors one to five inclusive, are for convenience, presented in the brief in one group, (Brief of Plaintiffs in Error, p. 50).

Since this group of no means raises the same question, Defendant in Error has some difficulty, as the court will, in ascertaining the precise point intended to be presented especially since assignment 5 in itself is duplicitous, vague and uncertain and seems to attempt to strike at several supposed defects in the indictment and the evidence, or in both.

Seeking to attach some undiscoverable importance to the ruling of the court in the following language, "I cannot rule of what the evidence shows in advance of hearing the evidence. Objection overruled", (Tr. p. 101) only an involved argument appears for the basis of this ruling, which, in fact, is no ruling at all upon which error can be assigned. (Tr. p. 100) (Brief of Plaintiffs in Error 51-2).

Plaintiffs in Error proceed to admit that this rul-

ing was undoubtedly correct (Brief of Plaintiffs in Error P. 52) thus leaving no ground for dispute or debate.

Seeking to follow the argument of the Plaintiffs in Error on this point we find many admissions of guilt of these appealing defendants, (Brief of Plaintiffs in Error 55-61-3-4-9) but we find no further attempt to relate the argument to an assignment of error until we come to the calm assertion (Brief of Plaintiffs in Error P. 64-6) that the motion to conpel the government to elect should have been granted.

To elect to do what?

Much stress seems to be laid upon this assignment by way of repetition. We find it made on page 64 once and on page 66 twice, each time in the same language.

Of course a discussion of assignment 3 need not be pursued because the Plaintiffs in Error do not themselves present any argument to support assignment 3, to the effect that the court erred in overruling a demurrer to the indictment, it being a self evident fact that the demurrer could not have been sustained under any known theory of law.

It is also worthy of observation that the brief

utterly refrains from citing any authority to sustain any of the bizarre argument advanced.

It has been held many times that no direct evidence is necessary to establish a conspiracy, or that a formal agreement must be shown. It is enough if there are facts and circumstances in which the alleged conspirators are involved, separately or collectively, from which can be inferred a preconcerted action.

In Davis v. U. S., 107, Fed., 753, it was contended that there was no evidence of conspiracy, and the Circuit Court of Appeals of the Sixth Circuit said:

> "This might be so if it were necessary to prove the combination by distinct and formal agreement. But, as we held in the case of Reilley v. U. S. (recently decided) 106 Fed. 896, this is not necessary. If the evidence shows a detail of facts and circumstances in which the alleged conspirators are involved, separately or collectively, and which are clearly referable to a preconcert of the actors, and there is a moral probability that they would not have occurred as they did without such preconcert, that is sufficient if it satisfies the jury of the conspiracy beyond a reasonable doubt. We have considered the evidence, and think it ample to convince the jury that there was a common understanding between the plaintiff in error and others in his neighborhood, some of whom are mentioned in the indictment."

In Reilley v. U. S. 106 Fed., the same court held:

> "It is also urged that the evidence did not justify the verdict in that there was no proof of

conspiracy to do what was done. As has been often remarked, it is not necessary that direct evidence of a formal agreement should be given in such cases. If the evidence of the separate details of the transaction as it was carried out indicates with the requisite certainty the existence of a preconcerted plan and purpose, that is sufficient; and we think the evidence was such as to warrant the verdict."

In Douglas v. U. S. 169 Fed. 625, the same objection was raised by the plaintiff-in-error as is raised here, and the Court said:

"If it was intended by the objection just mentioned to insist that Doyle's connection with the scheme should be first shown, there are two answers: First, that enough had already been proven to warrant the belief that Doyle was involved in the scheme; and, secondly, there is no hard and fast rule that the evidence of concert should be first put in. The substance of the rule is that the jury must be satisfied that the concert existed before they can consider what one of the parties did or said in carrying out the joint purpose. In overruling the objection, the court very properly instructed the jury as to what the rule is. Besides, the order of production of evidence is one largely in the discretion of the court. But, further, as has been observed in many instances, probably in most, direct proof of the formation of the plot is not obtainable. Such plots are usually formed in secret. The existence of preconcert may be inferred from the subsequent conduct of the parties."

Chadwick v. United States, 141 Fed. 225;
United States v. Benson, 70 Fed. 591.

The plaintiffs-in-error, not having assigned any error on the instructions given, it must be assumed that they were correct, and if the Court correctly stated the law as above set out, we submit that there is nothing to plaintiffs-in-error's first five assignments, as argued in their brief because, primarily, under the law as we understand it, this question was one of fact and one that the jury alone could pass upon, and having passed upon it and found that the plaintiffs-in-error were in such a conspiracy as is set out in the indictment, it is now not open to debate.

However, coming to the next assignments, we find the sixth, seventh and eighth (6-7-8) grouped together for discussion. Since the transcript shows nothing further than a general objection upon the general grounds as incompetent, irrelevant and immaterial, no exception saved, it is unnecessary to pursue the discussion of the so-called sixth (6) and seventh (7) assignments. It is enough to say as to the sixth, that the witness Sarah Lewis also was a co-defendant, was a hotel keeper and kept an apparent rendezvous for some of the conspirators and was also a close personal friend of her co-defendant Fowler, and she had voluntarily testified as to his rooming with her. In this situation the government merely inquired as to her knowledge of

the facts known to her about the character of her roomer and her close friend and co-defendant.

As to the 7th assignment, the cross-examination objected to as unfair to Fowler and unlawful under the constitution, is no more than an inquiry of the circumstances under which he left the employ of the Northern Pacific Railway Company from which he stood accused of conspiracy to steal goods. Furthermore on the evidence in this record, the Plaintiff in Error Fowler, defendant below, stands not only charged but convicted by all the evidence including that of the witness and defendant Ratcliff of being present at the negotiating of the sale of stolen goods in connection with defendants Ratcliff, Hanson, Mellison and witness Ayers, (Tr. pages 90-1-106-8-9-190-91).

The 9th assignment of error is not discussed by the Plaintiffs-in-Error in their brief and therefore may be disregarded.

The 10th assignment of error only complains of the overruling of the motion for a new trial, an insufficient ground, as has been held so often the citation of authority is unnecessary.

We find no discussion by the Plaintiffs-in-Error of the 11th and 12th assignments of error, and in fact none could be predicated upon them.

There is found throughout the brief some general discussion of alleged legal principles thought to be of advantage to the Plaintiffs-in-Error, but in view of the entire evidence it is impossible to perceive the relevancy of such discussion.

To review the contentions of these Plaintiffs-in-Error, defendants below, we find they revolve themselves as follows:

1. A challenge to the sufficiency of the indictment, but we find the indictment so clearly good as written that its sufficiency cannot be successfully attacked, and in fact, as we find the argument, no serious attempt is made to attack it as an indictment, but some error is thought to be based upon the indictment and the evidence offered and received thereunder. At this point, even if there were anything in the argument that the conspiracy first described by the defendant Ratcliff, is the only one on which the government can rely, it is shown by that evidence that Fowler was an active member of the conspiracy, because he appeared at the midnight sale intended to be conducted at Renton, and was particeps criminis with the rest of the conspirators found there that night seeking to sell some of the loot which had come into their possesion and in which he was interested along with the other conspirators seek-

ing to sell other parts of the loot which had fallen to their share.

Counsel for the plaintiffs in Error seems to think that not only is the government limited by the scope of Ratcliff's testimony but also by its scope in part and also is limited by the defendant Fowler's testimony, who though admitting himself to be present at the time and place the conspirators met to dispose of the stolen goods, denies he is a member of the conspiracy, a most fallacious argument on the part of the learned counsel of the Plaintiffs-in-Error who seems to think that the remark of the Honorable presiding Judge that he did not conceive it necessary for every conspirator to get into a conspiracy on the ground floor, was not founded in law.

2. Plaintiffs in Error next complain of some shadowy failure on the part of somebody to elect between the witnesses. We know of no such doctrine of law, the facts proven in any case, to be ascertained by the verdict of the jury and the jury to be the sole judge of the weight of the testimony admitted.

3. Again we find complaint with respect to denial of a motion for a directed verdict when the evidence taken as a whole to convict the defendants, not only of a conspiracy but the consummated crime, and especially

is this true of the two defendants now seeking relief by process of appeal.

This conspiracy, like many other conspiracies, is proven by various and sundry fragments of evidence proceeding from the lips of various witnesses who were in some way or another connected with the general conspiracy of the looting of the general merchandise cars moving or having moved in intestate commerce and the conversion of such shipments as were successfully stolen to some one or another of the men and women interested in the general scheme of conspiracy.

It is a clear case of addition, division, silence and understanding to the effect, between all parties defendant servants of a carrier, and their associates, to enjoy the proceeds of such nefarious transactions as came their way and keep silent with respect to the acquisitions secured by similar nefarious conduct of others interested in the same general object, who happened to gain profit through their opportunities and thievish dispositions.

We think there is one final suggestion which must sweep away all of the entire argument of the Plaintiffs in Error and it is this—the defendant Ratcliff withdrew a plea of not guilty and pleaded guilty to the indictment and all the counts thereof. (Tr. P. 85). Later on in the trial the defendant Bourdell

withdrew his plea of not guilty and pleaded guilty to the indictment and all its counts, making two self-confessed conspirators and Bourdell, at least, is shown to have been intimately connected in all of his disposing transactions of the stolen property with the defendant Singer, and that the evidence shows that Singer had some of the stolen property in his possession (Tr. P. 132), and the evidence is amply sufficient to show that Singer and Bourdell intimately associated themselves in a design and proposition to procure and dispose of these stolen goods, so on no theory can Singer be less guilty than his close associate and co-defendant Bourdell, (See Brief of Plaintiffs in Error, 57-9-60-1-2).

In final analysis we find Fowler connected with the conspiracy by his joint action on the night of the attempted sale of the stolen goods in the garage at Renton with his other co-defendants and we find Singer constantly associated with Bourdell in various illegal dispositions of stolen goods (Tr. p. 126-8), and we find Bourdell, who pleaded guilty, at times a member of the train crew composed of the self-confessed conspirator Ratcliff and the convicted conspirator Creed Lane. (Brief of Plaintiffs in Error, p. 58).

In law it is entirely unnecessary for all co-conspirators to know each other or to actually agree with each

other or to hold directors' meetings and take minutes of their actions. It is enough for a man to in any way be connected with the furtherance of the object of the conspiracy after its formation, by understanding, express or implied, growing out of the divers relations of the several parties to the alleged conspiracy.

The judgment in this case should stand affirmed as to both the plaintiffs in error, Lemuel S. Fowler and Thomas Singer.

Respectfully submitted,

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